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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PHASE II CHIN, LLC and LOVE & MONEY, LLC, (formerly dba O.P.M.L.V., LLC,)	CASE NO. 2:08-cv-162-JCM-GWF
)	
	)	OPPOSITION TO PLAINTIFF
	)	PHASE II CHIN, LLC'S
Plaintiffs,	)	OBJECTIONS TO THE
	)	MAGISTRATE JUDGE'S
vs.	)	ORDER DENYING
	)	PLAINTIFF'S MOTION TO
FORUM SHOPS, LLC, FORUM DEVELOPERS LIMITED	)	DISQUALIFY COUNSEL FOR
PARTNERSHIP, SIMON PROPERTY	)	THE CAESARS DEFENDANTS
GROUP LIMITED PARTNERSHIP,	)	ATTORNEY STEVE MORRIS
SIMON PROPERTY GROUP, INC.,	)	AND THE LAW FIRM OF
CAESARS PALACE CORP., and	)	MORRIS PETERSON; AND
CAESARS PALACE REALTY CORP.,	)	SUPPORTING
	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES
Defendants.)	

Defendants Caesars Palace Corp. and Caesars Palace Realty Corp.
("Caesars") hereby oppose Plaintiff Phase II Chin, LLC's ("Chinois") Objections to
the Magistrate Judge's Order denying Chinois' motion to disqualify Caesars'
attorney, Steve Morris ("Morris") and the Law Firm of Morris Peterson. This
opposition is based on the record in this case.

1 I. INTRODUCTION

2 This dispute arises out of a single telephone call made by attorney
3 Phillip Heller ("Heller") to Steve Morris in October 2007. Mr. Heller was shopping
4 for a Las Vegas lawyer to act as local counsel in a lawsuit he planned to file in Las
5 Vegas against Chinois' lessor of premises located in the Forum Shops adjacent to
6 Caesars Palace. Heller told Morris he wished to sue the Forum Shops, LLC, an
7 entity that is related to defendant Simon Property Group.

8 The Magistrate Judge found that Morris and Heller
9 agree that they discussed the fact that Chinois had been
10 sued in Delaware and that it intended to sue Simon in
11 Nevada. They both agree that they discussed whether the
12 suit should be filed in state or federal court and they
13 discussed the local judiciary and Mr. Morris gave advice
14 on those matters. Although Mr. Heller states that he
15 discussed the eight causes of action to be alleged in
16 Plaintiff's complaint, Mr. Morris recalls no such
17 discussion. Nor does he recall any discussion about
18 "litigation strategy in regard to the particulars of the case
19 or discussions regarding Plaintiff's settlement position.
20 Mr. Morris, however, recalls that he told Mr. Heller that
21 the Simon entities would be a difficult opponent.
22 Mr. Heller, however, states that they also discussed the
23 effect that naming Caesars as a defendant would have on
24 Chinois's settlement position.

25 Order, 2/19/09 at 13, Ex. E to Objections, and the conversation ended.¹

26 The Magistrate Judge correctly concluded that when Morris spoke to
27 Heller, Chinois was, at best, a *prospective* client. Chinois was not a current or
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21 ¹ There is no record of the telephone call, which until the hearing on
22 February 12, 2009, the parties treated as having occurred in October 2007. At the
23 hearing, attorney Fagelbaum said, "But I do know when it [the telephone call] took
24 place. It was December 26, 2007." Transcript at 28, ll. 14-15. In an effort to prove
25 his statement, Fagelbaum attempted to introduce a newly-discovered telephone
26 record of his firm, which the Magistrate Judge rejected as having been
27 inappropriately tendered in a reply argument at the hearing after both sides had
28 confirmed "there was no contemporaneous record of when this phone call was
made. . . ." *Id.*, ll. 20-25.

26 This "record" and its significance to Chinois is raised again in the Objections
27 at 4, n. 3. It is dealt with here only to dispose of it for good, as irrelevant and false:
28 Morris was not in Las Vegas on December 27, 2007, so he could not have returned
Heller's call on that day. Declaration of Steve Morris; Declaration of Jeana Hart,
Exs. A and B hereto.

1 former client. Caesars was both. The Magistrate Judge also—and clearly and
2 correctly—determined that Chinois "has not demonstrated that any information
3 provided to him [Morris] in late 2007 could be significantly harmful to its position
4 at this point in the litigation," Order at 15, ll. 15–18, as Nevada Model Rule 1.18
5 would require Chinois to demonstrate to disqualify Morris or his firm. Order at
6 8–9. The Magistrate Judge went on to say that the Court

7 would not hesitate to disqualify Mr. Morris and his law
8 firm if it was reasonably convinced that confidential
9 information was disclosed to Mr. Morris by Mr. Heller in
10 their 2007 conversation that could be significantly harmful
11 to Plaintiff. Plaintiff has not shown, however, that
12 confidential information was communicated to Mr. Morris
13 which would have justified his or his law firm's
14 disqualification in February 2008. The basis for such
15 disqualification is even less apparent one year later.
16 Under these circumstances the competing interests weigh
17 heavily in favor of Defendant Caesars' right to be
18 represented by counsel of its choice. Accordingly,

19 **IT IS HEREBY ORDERED** that Plaintiff's Motion to
20 Disqualify Attorney Steve Morris and the Law Firm of
21 Morris Peterson (#70) is **denied**.

22 The objections to this clearly reasoned and supported order should be
23 denied.

24 **II. STANDARD OF REVIEW**

25 A district judge may reconsider a magistrate's order on a non-
26 dispositive matter "where it has been shown that the magistrate judge's order is
27 clearly erroneous or contrary to law." *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th
28 Cir. 2002); *see also* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); LR IB 3-1. Findings
on questions of fact are reviewed under the deferential "clearly erroneous"
standard. *United States v. Hughes Aircraft Co.*, 162 F.3d 1027, 1030 (9th Cir. 1999).
Questions of law are reviewed de novo. *See Kulas v. Flores*, 255 F.3d 780, 783 (9th
Cir. 2001). Under either or both standards the Magistrate Judge's order is
supported by the law and evidence of record. Chinois has not shown otherwise; its
objections should be denied.

1 **III. MAGISTRATE JUDGE FOLEY'S DECISION IS NOT CONTRARY TO**
2 **LAW**

3 As Magistrate Judge Foley pointed out, matters of attorney
4 disqualification in federal courts are determined by state law. *In-N-Out Burger v. In*
5 *& Out Tire & Auto, Inc.*, 2008 WL 2937294 at *2 (D. Nev. 2008), *citing In re County of*
6 *Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000) ("because we apply state law in
7 determining matters of disqualification, we must follow the reasoned view of the
8 state supreme court when it has spoken on the issue"). Therefore the Nevada
9 Model Rules of Professional Conduct, as adopted by the Nevada Supreme Court,
10 govern disposition of the disqualification issues here. Local Rule IA 10-7(a)
11 ["Model Rules of Prof. Conduct, ("Model Rules") as adopted and amended . . . by
12 the Supreme Court of Nevada govern lawyers practicing in this federal District
13 Court].

14 **A. Magistrate Foley Applied The Appropriate Model Rule Standard to**
15 **Decide This Case.**

16 Attorney conflicts of interest with former clients are generally
17 governed by Nevada Model Rule 1.9 which states an attorney's duties to former
18 clients. Chinois is not a former client of Morris or Morris Peterson. Prior to the
19 telephone call in dispute, Morris did not know Chinois or Heller, nor had Morris
20 spoken to him. Magistrate Judge Foley correctly distinguished this case from cases
21 in which communication with a former client was analyzed under Model Rule 1.9.
22 Chinois was, at best, a *prospective client* when Heller spoke to Morris. In such a
23 situation, Model Rule 1.9 comes into play only if the requirements of Model Rule
24 1.18 are first satisfied, and they have not been satisfied here.

25 Model Rule 1.18(c) states, "A lawyer subject to paragraph (b) shall not
26 represent a client with interests materially adverse to those of a prospective client
27 in the same or substantially related matter if the lawyer receives information from
28 the prospective client that could be *significantly harmful* to that person in the
matter." (Emphasis added.) To meet the "significantly-harmful" standard, Chinois

1 must—but did not—produce evidence of such a disclosure by Chinois to Morris, as
2 the Magistrate Judge found. He was not clearly erroneous in doing so: "In contrast
3 to cases in which there was an explicit attorney client relationship which gives rise
4 to a presumption that confidences were divulged, the question of whether
5 confidential information passed between the prospective client and attorney is
6 crucial in determining whether an implied attorney client relationship existed, and
7 therefore must be *proved* rather than assumed" (emphasis added) Order at 10 (*citing*
8 *Polyagro Plastics, Inc. v. Cincinnati Milacron, Inc.*, 903 F. Supp. 253, 257 (D. Puerto
9 Rico 1999)). Chinois has failed to meet this burden; it assumes "significantly
10 harmful facts" were disclosed without offering evidence to establish the facts of
11 disclosure.

12 In ruling against Chinois, the Court acknowledged the decision in
13 *ADP, Inc. v. PMJ Enterprises, LLC*, 2007 WL 836658 *5 (D.N.J. 2008), "that under Rule
14 1.18(c) the moving party must proffer compelling evidence that significantly
15 harmful information was disclosed." Magistrate Judge Foley then went on to
16 discuss *Sturdivant v. Sturdivant*, 341 S.W.3d 740, 746 (Ark. 2006), which held that "a
17 court may be more likely to infer that potentially harmful confidential information
18 was disclosed where the consultation was with a lay person who may not fully
19 appreciate the significance of the disclosures." Here the "consultation" was
20 between experienced lawyers. Magistrate Foley explored the effect of attorney to
21 attorney communications in cases tendered by Chinois, *People ex rel. Dept of*
22 *Corporations v. Speedee Oil Change Systems*, 980 P.2d 371, 380 (Cal. 1999) and
23 *Laryngeal Mask Company LTD v. Ambu*, 2008 WL 558561 *5 (S.D. Cal 2008), and
24 concluded they were too dissimilar to be of help to Chinois in this case. He also
25 considered the effect of Chinois' later disclosure of much of the alleged
26 "confidential information" by the filing of the complaint in January 2008. Order at
27 12, *citing ADP*, 2007 WL 836658 at *5.

28

1 Magistrate Judge Foley found *NO* evidence, other than the self-serving
2 conclusory declarations of Heller, that would support a finding of disclosure of
3 information significantly harmful to Chinois in this litigation to Morris in 2007 in a
4 single telephone call between these two attorneys. Thus, "unless there is evidence
5 to the contrary ... the court must assume that an attorney will observe his
6 responsibilities to the legal system as well as the client." *United Stats v. Walker River*
7 *Irrigation, Dist.* 2006 WL 618823 at *5 (D. Nev. 2006, McQuaid, M.J.) (citing *Geders v.*
8 *United States*, 425 U.S. 80, 93 (1976). There is no evidence that Morris acted
9 irresponsibly in turning down a lawsuit against his own client, Caesars, in 2008,
10 after speaking to Heller in 2007.

11 **B. Magistrate Judge Foley Did Not Require Chinois to Divulge Any**
12 **Confidences on Risk of Losing the Motion to Disqualify.**

13 A client is not required to divulge confidences disclosed to his attorney
14 to prove that an attorney-client relationship was formed. *Laryngeal Mask Company*
15 *LTD v. Ambu*, 2008 WL 558561 *5 (S.D. Cal 2008). Chinois was not required to do so
16 here. Magistrate Judge Foley thoroughly reviewed Chinois' evidence of disclosures
17 to Morris, including the circumstances of the telephone conversation between
18 Heller and Morris, and found that no "significantly harmful" confidences were
19 disclosed to Morris. A party moving for disqualification on behalf of a prospective
20 client "must have evidence to buttress the claim that a conflict exists." *In-N-Out*
21 *Burger*, 2008 WL 2937294 at *4 (citing *Robbins v. Gillock*, 109 Nev. 1015, 1017 (1993)).
22 Chinois did not establish the existence of a conflict through disclosures to Morris,
23 and the Magistrate Judge was not clearly erroneous in so ruling.

24 **C. The Cases Relied by Chinois Do Not Support Overturning the**
25 **Magistrate Judge's Order.**

26 Chinois has not shown that Magistrate Judge Foley's order is "contrary
27 to law." With the exception of the two cases discussed below, the facts of each of
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1 the cases cited by Chinois have been extensively discussed in Caesar's opposition
2 and will not be repeated in this response.²

3 First, Chinois relies on *Fierro v. Gallucci* for the proposition that a party
4 moving to disqualify opposing counsel is only required to prove that it was likely
5 the attorney had access to confidential information on facts—and law—dissimilar
6 to those in this case. The question was decided without reference to Model Rule
7 1.18(c) because New York does not adhere to the Model Rules. Moreover, in *Fierro*
8 there was more than one discussion with the challenged lawyer. The discussions
9 included facts, defenses, dollars at risk by the plaintiff, case law and applicable
10 legal theories. A fax—a writing—was sent by the challenged law firm to Fierro
11 regarding the case law applicable to the action. These facts are absent here.

12 Chinois also cites *Doucette v. Dlugolecki* for the proposition that an
13 attorney can be disqualified prospective client contact for a call lasting only 15
14 minutes with no face to face contact or exchange of documents. This case, too, does
15 not address Rule 1.18(c), but as in *Fierro*, it was the facts disclosed in the telephone
16 call that produced the court's decision: the challenged attorney discussed and
17 commented on the merits of the plaintiff's claims and expressed the opinion that it
18 was a "strong case," which prompted plaintiff to file the action, after the attorney
19 declined to represent him. Thereafter, the attorney showed up to defend against
20 the case he counseled filing. And the court found the relationship between the
21 discussion and the issues in the lawsuit "patently clear." There are no such facts
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24 ² The following cases are discussed at length in Caesar's opposition to
25 Chinois motion to disqualify as indicated. *In-N-Out Burger v. In & Out Tire & Auto*,
26 2008 WL 2937294 (D. Nev.) Opp at 10; *Robbins v. Gillock*, 109 Nev. 1015 (1993) Opp
27 at 10; *The People ex rel. Dept. of Corps., v. Speedee Oil Corp.*, 20 Cal. 4th 1135 (1999)
28 Opp at 14; *Bays v. Theron*, 418 Mass. 685 (1994) Opp at 13; *Polyagro Plastics, Inc. v.*
Cincinnati Milacron, Inc., 903 F. Supp. 253 (D. Puerto Rico) Opp at 12. These cases
and the newly-cited cases of *Fierro v. Gallucci*, 2007 WL 4287707 *21 (E.D.N.Y.); and
Doucette v. Dlugolecki, 2006 WL 2709456 (Conn. Super.), turn on rules similar to
Model Rule 1.9. They do not reflect application or consideration of Model Rule
1.18 that addresses a prospective attorney-client relationship.

1 here, nor are the relationships between the facts allegedly disclosed by Heller and
2 the issues in this lawsuit patently clear.

3 **D. The "Appearance of Impropriety" Standard Not a Standard to**
4 **Determine Disqualification.**

5 Chinois criticizes Magistrate Judge Foley for not addressing the
6 appearance of impropriety and Chinois' belief that because of Heller's telephone
7 call to Morris, "public confidence in the integrity of the bar is challenged when
8 ethical rules are circumvented for the sake of expediency" Objection at 16. There
9 are two things wrong with this "objection": (1) "appearance of impropriety" is a
10 subjective statement; it is not a standard for evaluating lawyer contacts: "the
11 appearance of impropriety is no longer grounds for disqualifying a lawyer from
12 representing a party to a lawsuit." *Herman v. Gutterguard*, 199 Fed. Appx. 745, 755
13 (11th Cir. 2006). In upholding the lower courts decision to disqualify counsel the
14 court noted, "the [district] court properly applied the conflict of interest standard
15 and not the outdated appearance of impropriety standard." *Id.* The "appearance of
16 impropriety" is simply not a standard for disqualification in Nevada and in other
17 states that have adopted the Model Rules.

18 (2): The ethical rule involved here is Model Rule 1.18(c). It is the "law"
19 applied by the Court to the facts—or absence of facts—tendered by Chinois.
20 Magistrate Judge Foley understood and correctly applied Rule 1.18(c). Thus,
21 neither the Court nor Morris has "circumvented" an ethical rule that will challenge
22 "public confidence in the integrity of the bar." Objection at 16.

23 Magistrate Judge Foley's order denying Chinois motion to disqualify
24 was not contrary to law. The objections to his order that correctly states and
25 applies the law should be overruled and his order affirmed.
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1 **IV. MAGISTRATE JUDGE FOLEY'S ORDER IS NOT THE PRODUCT OF**
2 **CLEAR ERROR**

3 **A. The Legal Standard.**

4 When reviewing a Magistrate Judge's order, the district court "may not
5 simply substitute its judgment for that of the deciding court." *Grimes v. San*
6 *Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). The District Court must accept a
7 Magistrate Judge's findings of fact unless the District Court is left with the "definite
8 and firm conviction that a mistake has been committed." *United States v. Hughes*
9 *Aircraft Co.*, 162 F.3d 1027, 1030 (9th Cir. 1999). The Ninth Circuit has said that "[t]o
10 be clearly erroneous, a decision must strike us as more than just maybe or probably
11 wrong; it must ... strike us as wrong with the force of a five-week-week-old
12 unrefrigerated dead fish." *Hayes v. Woodford*, 301 F.3d 1054, 1067 n. 8 (9th Cir. 2002).
13 Chinois has not tendered such a carcass to this Court. There is no evidence of
14 record to support the self-serving declaration of Heller that he disclosed
15 significantly harmful information to Morris that is not of record and could hereafter
16 be used against Chinois. Because of the near complete lack of evidence to support
17 its claims, Chinois has not created a "definite and firm conviction that a mistake has
18 been made." Its objections should be denied.

19 **B. Magistrate Foley's Findings of Fact Are Supported by the Record.**

20 Magistrate Foley conducted a reasoned and thorough survey of the
21 evidence presented in this case, including reasonable inferences drawn from the
22 evidence. He acknowledged that Morris and Heller disagreed in their declarations
23 as to the substance of their one telephone call, the length of the call, and whether
24 other lawyers were also being consulted to act as local counsel. Order at 12-13.
25 Most importantly, the Magistrate Judge, following the applicable law, stated that
26 "the plaintiff has the burden of showing confidential information was disclosed to
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1 Morris that could be significantly harmful," Order at 13, just as Rule 1.18(c)
2 mandates. Chinois has failed to carry its burden.³

3 Because the declarations of the parties were at odds, the Court
4 considered "other relevant facts and circumstances that tend to support or
5 undermine the parties position." Order at 13. These facts included: 1) that there
6 was no face to face meeting between Heller and Morris; *Id.*; 2) the benign nature of
7 discussing the characteristics of Nevada state and federal courts, *Id.*; 3) the fact that
8 no documents were sent to or from Morris, *Id.*; 4) Heller's apparent waiver of
9 conflict by allowing Morris Peterson to continue to represent Caesars in light of the
10 alleged conflict; *Id.* at 15, and 5) later filing of this lawsuit and disclosure therein of
11 the eight causes of action allegedly disclosed to Morris 18 months ago. Order at 14.
12 These *facts* led Magistrate Foley to determine that Morris is not the repository of
13 significantly harmful information that would require disqualification of him or his
14 firm.

15 **C. Chinois' Objections to the Magistrate's Reasoning That Led to His**
16 **Order Do Not Lead to a Different Result.**

17 Chinois complains that the magistrate "missed the point" when stating
18 that no ethical wall was created prior to the February 13th call between Morris and
19 Chinois. The *facts* show that "the point" was not missed by the Court: Morris
20 Peterson represented Caesars in this action prior to Heller's February 13 call to
21 Morris. That call did not result in an "ethical screen" nor was one discussed.
22 Morris did not know of this case at the time. Kris Pickering was representing
23 Caesars and continued to do so without objection by Chinois. Morris was not

24 ³ Chinois complains that taking Morris's declaration that he did not receive
25 confidential information at face value would defeat all motions to disqualify. This
26 contention merely overlooks what is at issue here: Chinois was not Morris's former
27 client. It was a *prospective* client whose disclosures to Morris are evaluated under
28 Model Rule 1.18(c). If Heller's declaration meets the requirements of Rule 1.18(c)
by asserting conclusions without evidence to support them, then the Rule becomes
meaningless: "Significantly harmful" information would be shown to have been
disclosed by merely saying that it was, which is all Heller's declarations
accomplish.

1 involved in that work at all. As noted by the Magistrate Judge, "this appeared to be
2 a reasonable solution [to Heller's concern], not an admission of conflict." Order at
3 14.

4 Chinois also contends that Magistrate Foley erred when he determined
5 that the confidential information allegedly disclosed to Morris was rendered
6 harmless by Chinois agreement to allow Ms. Pickering to continue to represent
7 Caesars. Chinois asks, "why was Heller not entitled to rely on Morris'
8 representation in February 2008?...[and] Ms. Pickering's assurances that Morris' call
9 with Heller would not be discussed." Magistrate Judge Foley answers the question
10 in his review of an email exchange between Morris and Heller regarding the
11 alleged confidential information. The Court noted that Heller accepted Morris's
12 representation that he had little recollection of the earlier conversation. "Perhaps
13 more tellingly, even after being informed that Ms. Pickering is not only Morris's
14 law partner, but also his spouse, Heller did not express any concern about her
15 handling Caesar's defense." Order at 14. This is clear evidence of waiver, if not an
16 admission that the unknown information would not be of consequence to Chinois
17 if disclosed in the future.

18 Magistrate Foley's order should be applauded, not condemned, and it should
19 be affirmed.

20 V. CONCLUSION

21 Chinois has not met its burden to establish that the Magistrate Judge
22 Foley's order is clearly erroneous on the facts or contrary to law in stating the effect
23 of the facts. The Magistrate Judge's factual conclusions are supported by the record
24 and the inferences drawn therefrom are reasonable. The Magistrate Judge correctly
25 applied the law regarding communication with a prospective client in making the
26 order Chinois objects to. Chinois failed to show that it disclosed information to
27 Morris in 2007 that would be significantly harmful to Chinois if disclosed in 2009.

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1 For these reasons the Plaintiff Phase II Chin, LLC's Objections to the
2 Magistrate Judge's Order Denying Plaintiff's Motion to Disqualify Counsel for the
3 Caesars Defendants Attorney Steve Morris and the Law Firm of Morris Peterson
4 should be denied.

5
6 MORRIS PETERSON

7
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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of Morris Peterson, and that the following documents were served via electronic service:

**OPPOSITION TO PLAINTIFF PHASE II CHIN, LLC'S OBJECTIONS TO THE
MAGISTRATE JUDGE'S ORDER DENYING PLAINTIFF'S MOTION TO
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STEVE MORRIS AND THE LAW FIRM OF MORRIS PETERSON; AND
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

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DATED this 11th day of March, 2009.

By: 